United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1177

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

DOCKET NO. 76-1177

UNITED STATES OF AMERICA

APPELLEE

vs.

WILLIAM EUGENE ROBINSON

APPELLANT

BRIEF OF APPELLANT WILLIAM EUGENE ROBINSON

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Title 28, United States Code, Section 144

Bias or Prejudice of Judge

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further thereon but another shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Rule 701, Federal Rules of Evidence

Opinion Testimony by Lay Witnesses

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the wit-

ness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 704, Federal Rules of Evidence

Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 803, Federal Rules of Evidence

Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule even though the declarant is available as a witness:

(1) Present sense impression. A statement describing an event or condition made while the declarant was perceiving the event, or immediately thereafter.

(6) Records of regularly conducted activity. A memorandum, report, record or data compilation, in any form, of acts, events conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that

business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

STATEMENT OF THE ISSUES

1. After the first trial ended in a hung jury, are the following facts "sufficient" within the meaning of Title 28, United States Code, Section 144 to show prejudice or bias in favor of the Government on the part of the judge, thus requiring that judge to disqualify himself from presiding at the second trial;

   (a) At the time of sentencing of a confessed accomplice who had refused to testify in the first trial, the judge referred to the accomplice's failure to co-operate and imposed the maximum sentence allowable under the statute;

   (b) Notwithstanding the expiration of the 120 day time limit imposed by Rule 35 of the Federal Rules of Criminal Procedure, the judge failed to rule on the accomplice's Motion for a Reduction in Sentence prior to the second trial

   (c) The pendency of the accomplice's Motion for a Reduction in Sentence became an integral part of the negotiations and agreement which ultimately resulted in the accomplice's decision to testify during the second trial.

2. Do the above facts effectively align the judge with the Government against the defendant -- at least in the eyes of the jury -- thus depriving the defendant of his right to due process under the Fifth Amendment and his right to a fair trial under the Sixth Amendment?

3. Under Rules 701 and 704 of the Federal Rules of Evidence, is the following opinion testimony of a layman admissible: A Connecticut Correctional Officer saw a bank surveillance photograph of the robbery and identified as someone else the individual claimed by the Government to be the defendant. The person identified by the Correctional Officer as being the bank robber in the photograph had a record of prior convictions for armed robbery and, at the time of the Trap Falls bank robbery, was wanted by the Bridgeport police for two other recent armed robberies. Moreover, the physical characteristics -- height, weight and age -- were similar to those of the defendant's.

4. Under Rules 701 and 704 of the Federal Rules of Evidence, is the following opinion testimony of a seven year friend of the defendant's admissible: After looking at the bank surveillance photograph, this person would have testified that the person claimed by the Government to be the defendant was, in his

opinion, not the defendant.

5. Under Rule 803(6) of the Federal Rules of Evidence, what is the burden the Government must satisfy to establish the trustworthiness of the "source of information" or its "method of preparation" to admit incomplete business records which are intended to rebut critical alibi testimony?

6. Was the manager of the Unemployment Compensation Office in New Haven, Connecticut a witness "qualified" within the meaning of Rule 803(6) to introduce documents taken from the Bridgeport and Weathersfield Offices of the Connecticut State Department of Labor?

7. Was a statement about the unreliability of certain records taken from an employee charged with compiling those records at the time he was gathering those records or shortly thereafter admissible under the "Present sense impression" exception to the hearsay rule, Rule 803(1) of the Federal Rules of Evidence?

8. In the interests of justice, should the court have granted a brief continuance to allow the defense to obtain testimony showing the unreliability of certain records submitted by the Government to rebut the

defendant's alibi?

9. Should the court have included the following language in the charge to the jury:

> "... the use of photographs may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal or may have seen him under poor conditions. Even if the police follow the most correct photographic identification procedures and show him pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent courtroom identification."

STATEMENT OF FACTS

On Tuesday, February 18, 1975 at approximately 1:50 p.m., three men robbed the Trap Falls Branch of the Connecticut National Bank in Shelton, Connecticut. Approximately $2,034 was taken. Two of the robbers carried handguns; the third carried a shoulder weapon. Only one robber wore a mask -- a wool-knit ski cap pulled down over his face. All of the robbers were black males. None wore gloves. According to the film taken from the photo-surveillance camera, the bank robbers spent a total of 84 seconds inside the bank. */

Two tellers -- Mrs. Retta Mondulick and Mr. Robert Welch -- were in the bank at the time of the robbery. Neither of the tellers are black. They provided the FBI and the Shelton police with general descriptions of the participants in the robbery and indicated that the get-away car was a 1972 or 1973 shiny black Cadillac.

The film from the surveillance camera was immediately taken by the FBI and developed. Certain pictures which seemed clearer than others on the filmstrip were blown up and re-printed. A large number of copies were made. These pictures were then circulated throughout the Bridgeport area by FBI agents and Bridgeport police officers.

The counter area of the bank -- touched by two of the

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*/ Mrs. Mondulick testified that, as the first man came into the bank, she was so suspicious she pushed the alarm immediately even though the robbery itself had not really begun. The alarm triggers the surveillance camera so that the film speeds up to a rate of one frame per second. By counting the frames, it was possible to determine precisely how long the robbers were in the bank.

bank robbers -- was dusted for fingerprints along with other areas of the bank. Fingerprints were found on the counters in the areas touched by the bank robbers and on the sign of one of the tellers, knocked off the counter by one of the robbers in the course of the robbery.

As the result of an unidentified informant's identification of the defendant in one of the bank surveillance photographs, the FBI obtained an arrest warrant from Magistrate Dion Moore of Bridgeport, Connecticut on February 24, 1975 calling for the arrest of William Robinson.

On February 25, 1975 at approximately 9:00 a.m., Special Agent Clarence Smith in the company of four other agents from the FBI and two officers from the Bridgeport Police Department went to the apartment of William Robinson and his wife. Armed with shotguns, they knocked on the door but received no response. They obtained a master key to the apartment which did not work. They obtained a sledge hammer and broke in the door, but no one was in the apartment. According to Smith, they spent five minutes looking through the apartment.

That same day, at 7:00 p.m., Agent Smith returned and spoke with Mrs. Robinson who invited them into the apartment. The agents inquired if Mrs. Robinson would have any objection if they looked through the apartment for clothing or guns or money, and she said it was all right.

In the course of the search, one of the agents discovered

a simulated leather coat, size 44, approximately three-quarters in length, dark brown in color, hanging in the closet. To the agents, this coat resembled the coat worn by one of the robbers. The bank surveillance photograph showed the coat as having certain folds in both the left and right lapels of the coat. To the agents, this coat had the same or similar folds.

Mrs. Robinson identified the coat as her husband's, and in response to an inquiry, told the agents they could take the coat.

On Friday, February 28, 1976, the defendant presented himself at the Bridgeport Police Department and inquired why the police had broken down his door and searched his apartment in his absence. The police knew nothing of the episode and contacted the FBI who then came over to the police department and arrested Robinson for bank robbery.

At that time, the FBI took a full set of case prints from the defendant and took his picture.

On March 4, 1975, Special Agent Smith took a spread of photographs -- including one of the defendant -- to show to Mr. Robert Welch. Robinson's picture was number eight in a spread of nine.

Welch went through the pictures and stopped at picture number five. He told Agent Smith that the individual in that

picture "resembled" the bank robber who had been directly across the counter from him. Smith told Welch to look through all of the pictures before making up his mind. When Welch got to the picture of Robinson, Welch stated that the eyes, nose and hair looked like those of the man across the counter from him. Smith asked Welch, "Do you think that is him?" Welch answered, "I can't be positive... but I am almost positive."

Welch turned the picture over, initialed the back and wrote, "Man at counter" on the back.

Two days later, Special Agent Paul McEvoy returned to the bank, this time to show the [illegible] spread to the other teller. The same picture which had been initialed and identified by Welch was in the spread. Like Welch before her, Mrs. Mondulick hesitated at one of the other pictures but ultimately selected the picture of William Robinson as the man who had been across the counter from her during the robbery. Mondulick then put her initials and the words "man at counter" on the back of the picture, noticing in the process that Bob Welch had also selected that photograph.

On March 10, 1975, a federal grand jury sitting in New Haven indicted William Eugene Robinson and David James Tate on three counts of bank robbery.

On June 5, 1975, hearings on the defendant's Motion to Supress Evidence (from the search) and to Suppress Eyewitness Testimony were held in the Post Office Building in New Haven.

On advice of counsel, the defendant Robinson requested that he be excused from these proceedings. The Court asked that Robinson appear formally to waive his right to be present on the record.

Although defense counsel and the Government made every effort to avoid a confrontation between the tellers and the defendant, a one-on-one show-up occurred outside Judge Newman's courtroom. That event became the subject of testimony at the hearing that day as well as at both of the trials.

At the conclusion of the hearing, Judge Newman denied the defendant's motions.

On June 9, 1975, the co-defendant, David James Tate, entered a plea of guilty to Count Two charging him with violation of 18 U.S.C. Section 2113(b), the ten year count.

That same day, a jury was picked in the Robinson case and the trial commenced.

On June 13, 1975 at 10:51 the jury retired to the jury room to deliberate. At 3:30 p.m., the jury announced that it was deadlocked and, after a modified Allen charge, returned to continue its deliberations. At 5:24, the jury advised that there was no real possibility of reaching a verdict, and the Court granted the defendant's motion for a mistrial.

On September 9, 1975, Judge Zampano sentenced David Tate to the full ten year term -- the maximum under the statute.

On September 18, 1975, the Government brought David Tate before a federal grand jury seated in Hartford, Connecticut. Tate refused to answer questions about the bank robbery, and, upon application by the Government, the Honorable T. Emmett Clarie, Chief Judge of the United States District Court for the District of Connecticut, issued an order of immunity. Tate persisted in his refusal to testify and was found to be in contempt of court. Tate was thereupon sentenced to imprisonment for the life of the grand jury, a period of time approximately thirteen months in duration. Judge Clarie specified that Tate's contempt sentence was to be served prior to and not concurrent with the ten year sentence imposed by Judge Zampano on September 9, 1975.

On January 20, 1976, a jury was selected and impaneled for the re-trial of the defendant, William Robinson. That re-trial was scheduled to commence before Judge Zampano on January 27, 1976.

The second trial lasted from January 27, 1976 to February 3, 1976 at the conclusion of which the jury found Robinson guilty on Counts One and Two charging violations of 18 U.S.C. Sections 2113(a) and (b) and not guilty on Count Three charging a violation of 18 U.S.C. Section 2113(d).

On April 14, 1976, William Robinson was sentenced to fifteen years.

On April 23, 1976, Judge Zampano granted David Tate's Motion for a Reduction in Sentence, reducing Tate's sentence

from ten years to six years imprisonment.

STATEMENT OF THE CASE

Summary

On March 10, 1975, a federal grand jury sitting in New Haven, Connecticut returned a three-count indictment charging William Eugene Robinson and David James Tate with robbing the Trap Falls Branch of the Connecticut National Bank on February 18, 1975.

On June 5, 1975 with the Honorable Jon O. Newman, United States District Court Judge for the District of Connecticut presiding, the Court held evidentiary hearings on the defendant's Motions to Suppress Evidence and Photographic Eyewitness Identifications. Those motions were denied.

On June 9, 1975, David Tate entered a plea of guilty to Count Two charging a violation of Title 18, United States Code, Section 2113(b) -- the ten year count -- with an understanding that the remaining two counts would be dismissed at the time of sentencing. That same day, a jury was picked for the Robinson trial.

The first trial of William Robinson began on June 10, 1976 and ended in a hung jury on June 13, 1975. The second trial began on January 27, 1976 and concluded on February 3, 1976 with a jury verdict of guilty on the first two counts charging Robinson with violations of Title 18, United States Code, Sections 2113(a) and (b) and a verdict of not guilty on the

third count charging Robinson with a violation of Title 18, United States Code, Section 2113(d).

The defendant testified at both trials.

Robinson was sentenced to 15 years imprisonment by the Honorable Robert C. Zampano on April , 1976.

Pre-Trial Proceedings

Evidentiary hearings out of the presence of the jury were scheduled for June 5, 1975 to consider the defendant's suppression motions. Prior to the beginning of the hearing, a show-up occurred outside of Judge Newman's courtroom.

The defendant came out of the elevator and, according to the testimony of Retta Mondulick, was immediately recognized by Mrs. Mondulick. She testified that she was sitting some forty feet away from the elevator but when the defendant stepped out of the elevator, she knew instantly that he was the man who had been across the counter from her in the bank. She also testified that she was feeling "paranoid" the day of the suppression hearing and that there were no other black people in the hallway at the time she spotted the defendant. */

The other teller, Mr. Robert Welch, testified that he heard Mrs. Mondulick say, "Oh, my God. He's here" and saw her burst into tears before he saw the defendant in the hallway outside the courtroom. He testified that he saw the defendant for a split-second only and then only in profile as the defendant was entering the courtroom, but that was sufficient time, according to Welch, for him to make an absolutely positive

*/ Mrs. Mondulick's testimony on this point changed at the second trial. She remembered then that five or six other blacks had been in the hallway.

identification. Although the glimpse was brief and Welch, like Mondulick was sitting some forty feet away from the defendant, Welch stated that he never had any doubt.

Robinson testified that when he came out of the elevator, he saw Special Agent Clarence Smith standing in the hallway who pointed at him and said to another agent, "Look, he's here." According to Robinson, Smith was standing between the elevator and Welch and Mondulick, so that when he pointed at Robinson, both Mondulick and Welch could see.

Smith confirmed much of Robinson's testimony, saying only that his comment, "Look, he's here" was in a low tone of voice which neither Mondulick nor Welch could have heard.

Because of the show-up in the hallway, Robinson attended the hearing and sat at counsel table throughout the proceedings.

The substance of the suppression hearings is reported in the Statement of Facts, and Judge Newman's opinions -- along with Judge Zampano's concurring opinion -- appear in the Appendix.

The First Trial

During the first trial, the Government's case relied almost entirely on the eye-witness testimony of the two tellers. Both of these individuals made in-court identifications of the defendant as one of the participants in the robbery.

In addition to the testimony of the tellers, the Government introduced photographs, blow-ups taken from certain frames in the film of the bank surveillance camera. The Government also submitted Robinson's leather coat, claiming that it

was the coat worn by one of the bank robbers in the photographs.

Officer John Bowens of the Bridgeport Police Department also testified for theGovernment, claiming that he had known Robinson for many years from the streets, that he had seen Robinson wearing hats similar to the one worn by the bank robber, and that, to him, the man in the bank surveillance photograph looked like William Robinson.

The Government introduced no fingerprint reports, no bait money, no wrappers, no weapons -- none of the tangible evidence that is often present in bank robbery prosecutions.

The first exhibit for the defense was the entire strip of film taken from the surveillance camera and shown to the jury with the use of a projector and screen. The defense contention was that careful study of the pictures showed that William Robinson was not one of the robbers, that Robert Welch had not once looked at the man across the counter who held a gun on him, that the man across the counter had in fact put his palm down on the counter, and that the robbery lasted only 84 seconds -- contrary to the testimony of the tellers who claimed it lasted six or seven minutes.

Cross-examination of Special Agent Smith revealed that fingerprints and palm prints had been found on the counter at the spot touched by the bank robber but none of those prints matched Robinson's. Smith revealed further that the tellers described the height of the robber to the FBI as being 5'10" while Robinson was 6'3" tall.

Kenneth Wilson testified for the defendant, stating that he had known Robinson for almost nine years and that to him, the person in the bank surveillance did not look like Robinson because the features were different.

Joseph Burroughs testified for the defense, stating that on February 18, 1976 he had been working for the defendant in Bridgeport as a numbers runner. Burroughs claimed that he had left the defendant at their "smokeshop" at 12:30 to go cash his unemployment check and that when he returned to the "smokeshop" at 1:45, the defendant was still there. Burroughs testified that he remembered the date because it was the day of his last unemployment check, and he always picked up his unemployment check on a Tuesday.

The defendant testified in his own behalf, confirming Burrough's alibi, and adding that the following day he had driven to Pennsylvania in a borrowed car where he held a job with Carolina Freight as a driver. Robinson testified that he drove trucks for the next ten days until he had learned from his wife that the police were looking for him. He then returned to Bridgeport and presented himself to the police to find out why they were searching for him. At that point, he had been arrested by the FBI.

David James Tate

David Tate was permitted to plead guilty to the ten year count on June 9, 1976. Tate refused to testify for the Government at the first trial of William Robinson.

On September 9, 1975, Tate was sentenced to the maximum sentence allowable under the statute, ten years.

On September 18, 1975, the Government brought Tate before a grand jury in Hartford where he was given immunity and ultimately found in contempt of court and sentenced to imprisonment for the life of the grand jury, that sentence to be served prior to and not concurrent with the ten year sentence he had received from Judge Zampano.

On January 26, 1976, Tate agreed to testify for the Government on the following conditions: (1) the Government would not oppose his Motion to Reduce Sentence which was still pending before Judge Zampano; (2) his contempt sentence would be vacated; (3) he would not be required to serve in an institution with William Robinson; and (4) the fact of his co-operation would be brought to the attention of the Parole Board.

The Second Trial

The primary differences between the first and second trial, from the Government's standpoint, were Tate's testimony and the testimony of Walter Glennon rebutting Burrough's alibi for Robinson. Glennon, the Manager of the Unemployment Compensation Office in New Haven, testified that records from the State Labor Department (no cancelled checks or vouchers) revealed that Burroughs' last payment was on February 5, not on February 18, and that Burroughs had not received any payment on February 18.

With respect to the defense case in the second trial, the primary changes were (1) the exclusion of any testimony about George Maher's identification of the man in the photograph from the surveillance camera as being Eli Turner, a former inmate of the Bridgeport jail wanted for armed robbery, and (2) the exclusion of Kenneth Wilson's testimony, and (3) the judge's refusal to charge the jury on the risks of misidentification from photographs and the dangers of "imprinting" the features of the man in the photograph rather than making an identification from independent sources of recollection.

1. The Court Erred in Failing to Disqualify Itself.

The unusual circumstances of this case threw the trial judge, through no real fault of his own, into a role traditionally played by the prosecutor -- that of administering the stick and then holding out the carrot to a confessed bank robber in order to procure his testimony for the Government at the trial of his alleged accomplice. The appellant submits that, after playing such an important part in obtaining the testimony of the Government's chief witness against the appellant, the judge was effectively aligned with the prosecution and should have disqualified himself from presiding at the trial.

In the Affidavit of Personal Prejudice required by Title 28, United States Code, Section 144, the appellant set forth the following "facts and reasons" for his belief that the judge was biased for the Government:

On September 9, 1975, the Honorable Robert C. Zampano, United States District Court Judge for the District of Connecticut, sentenced David James Tate to the maximum period of time of incarceration available under the statute to which Tate had pleaded guilty, Title 18, United States Code, Section 2113(b). At the time of sentencing, Judge Zampano stated, inter alia,

> There are a lot of other factors that the court must consider than repentence and a desire to do right.

> I want to consider the fact that three men went into a bank with shotguns and -- in fact, one cocked a revolver and pointed it at one of the tellers. I am not saying you did -- I am saying this was the atmosphere -- that money was taken in a hold-up; that this was done, at least with respect to you, with a long prior record, at least a serious record.
>
> In addition, there has been no cooperation whatever. You may have your own solid reasons for it, and I am not taking that into account in the sentencing. But you certainly have not demonstrated to me that you are now rehabilitated. You want to be a great citizen of this country, and yet two bank robbers are out there going scot free because you refuse to cooperate. I think tremendous lenience has been shown to you when the Government reduced the charges to limit me to ten years. (Emphasis added)

On December 4, 1975, David Tate filed a Motion to Reduce Sentence with Judge Zampano within the 120 day time limit set forth by Rule 35 of the Federal Rules of Criminal Procedure.

On January 26, 1976 in an interview with representatives of the Government on the evening before the trial of William Robinson was scheduled to begin, David Tate changed his mind and agreed to testify for the Government against Robinson. Before changing his mind, however, Tate determined that his Motion to Reduce was still pending before Judge Zampano in spite of the fact that by then the 120 day period had expired. (Tr. 234-236) In exchange for Tate's testimony, the Government agreed, among other things, that it would not oppose Tate's Motion to Reduce.

Tate had refused to testify in the first trial of William Robinson and that trial had ended in a hung jury.

On January 30, 1976, Judge Zampano denied the appellant's request that he disqualify himself, stating that the affidavit was "plainly insufficient on its face." App. , Tr.645 The court held that "the affidavit completely fails to allege a statement of fact which demonstrates personal bias or prejudice of a nonjudicial character." App. Tr.651

In Berger v. United States, 255 U.S.22, 33-34 (1921), the Supreme Court established the standard for the "sufficiency" of an affidavit filed under 28 U.S.C. Section 144. Under the Berger ruling, the affidavit must show "the objectionable inclination or disposition of the judge" and it "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

In Hodgson v. Liquor Salesmen's U.Loc. No.2 of State of N.Y., 444 F.2d 1344,1348 (2d Cir. 1971), this circuit elaborated on Berger, noting, "Mere conclusions, opinions, rumors or vague gossip are insufficient. (Cases omitted) To be sufficient, the affidavit must set forth facts, including the time, place, persons and circumstances, and where based upon an extra-judicial statement of the judge, the substance of that statement."

Appellant's claim here may be distinguished from those made in the cases cited in Judge Zampano's opinion. The

facts stated in this appellant's affidavit are not "vague or conclusory" nor are they attributable to an attorney's "braggadocio" or "his inflated view of his own persuasive influence as an advocate" as was the case in Hodgson. Unlike the appellant's affidavit, the Hodgson affidavit "failed to set forth any statement made by the judge or even allegedly made by the judge or any action taken or allegedly taken by the judge showing personal or extra-judicial bias or from which personal or extra judicial bias may even be inferred." 444 F.2d at 1347.

Nor does this appellant's affidavit pretend to attribute to Judge Zampano the kind of inflammatory remarks which were charged directly to the trial judge in Berger.

The circumstances of this case are similarly distinguishable from those in Wolfson v. Palmieri, 396 F.2d 121 (2d Cir. 1968) where a trial judge found himself confronted with the same defendants charged with different crimes. In Wolfson, the petitioners cited comments made by the trial judge in the previous case as the basis for bias, prejudice and hostility. The court concluded that those comments did not "rise to the level of exhibiting a bent of mind impeding impartiality of judgment."

Nor does this appellant rely on allegedly "excessive sentences and fines" in past cases to show prejudice against the appellant as was the case in Wolfson.

This appellant does not -- and cannot -- cite fights between the lawyer and the judge such as those in Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966) which, in the words of Judge Friendly, "were far from pleasant reading" as evidence of any antipathy on the part of Judge Zampano toward the appellant.

Nor does this appellant rely on a series of adverse rulings during the trial as grounds for disqualification as was the case in Lazofsky v. Sommerset Bus Company, 389 F.Supp. 1041 (EDNY 1975).*/ The appellant makes no claim of prejudice based on ex parte meetings between court and adversary counsel as was also the case in Lazofsky.

Moreover, the appellant does not contend that Judge Zampano did anything improper -- other than refusing to disqualify himself. The appellant does not argue, for example, that there was any legal error in Judge Zampano's conduct when he cited Tate's failure to testify as an important consideration at the time of Tate's disposition. Similarly the appellant does not contend that it was legally impermissible for Judge Zampano to withhold decision on David Tate's Motion to Reduce beyond the 120 day time limit set forth in Rule 35 of the Federal Rules of Criminal Procedure so as to keep that motion pending up to and through the Robinson trial.

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*/ The language in United States v. Grinnell, 384 U.S. 563, 583 (1966) that "The alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and re-

(Continued)

Nor does the appellant contend that it was legally improper for Judge Zampano ultimately to reduce David Tate's sentence to six years. The appellant cannot refrain from noting parenthetically that, contrary to Judge Zampano's assertion that he was not taking Tate's lack of cooperation into account in his sentenc on September 9, Tate's non-cooperation at that time was apparently responsible for at least four years of that ten year sentence.

The issue here is whether the allegations contained in the appellant's affidavit -- the factual basis of which is not in dispute -- demonstrate a frame of mind on the part of the trial judge sufficiently accusatory to this appellant as to indicate that he could not receive a fair trial. The issue here is whether Judge Zampano's involvement in the prosecutorial process was so great as to require his disqualification.

It would seem axiomatic that no man may accuse and also sit in impartial judgment.

Footnote Continued

suit in an opinion on the merits on some basis other than what the judge learned from his participation in the case" has, at least in this circuit, been seriously modified. In both Wolfson and Sugarman, the court was willing to consider incidents that occurred in the course of judicial proceedings. As the Wolfson court correctly concluded, "... to establish the extra-judicial source of bias and prejudice would often be difficult or impossible and this is not required. Comments and rulings by a judge during the trial of a case may well be relevant to the question of the existence of prejudice." 396 F.2d at 124.

In a trial involving the testimony of an accomplice, it is essential, if the jury is to make a fair judgment as to the credibility of the accomplice's testimony, that the jury know of any consideration given by the Government to the accomplice in exchange for that testimony -- whether a reduced sentence, reduced exposure, money, special conditions of incarceration or any other kinds of similar benefits. For that reason, it is well established that the terms of any agreement between a witness and the Government must be disclosed in their entirety to defense counsel.

It is usually the case that those terms are arrived at in the course of negotiations between the Government and counsel for the accomplice-witness. And it is usually the case that those terms include promises of more lenient treatment for the accomplice-witness than he might otherwise expect as the result of his testimony. The tools of the Government in these negotiations are, of course, the carrot and the stick: that is, if the accomplice does <u>not</u> testify, he will receive no consideration and may even receive harsher treatment (the stick) but if he does testify, he will be treated leniently (the carrot).

Typically, defense counsel argues -- and history shows that this argument is often successful -- that the accomplice's testimony is not trustworthy and should not be credited by the jury because the accomplice is falsely in-

criminating the defendant to serve his own personal interests rather than to serve the truth.

Judge Zampano's speech at the sentencing of David Tate, his apparent use of his sentencing power to coerce testimony, and his conduct in failing to act in a timely fashion on Tate's motion to reduce his sentence -- these actions and statements by Judge Zampano, when viewed in light of the Government's earlier failure to obtain a conviction of William Robinson at the first trial, placed Judge Zampano squarely in the middle of the prosecutorial process and effectively aligned the judge with the Government and transformed him into one of Robinson's accusors.

By his active participation in the procuring of Tate's testimony against Robinson, Judge Zampano assumed a role traditionally performed by theGovernment. The means employed to obtain an accomplice's testimony can never escape comment from defense counsel in final argument, but in this case, the target of that comment would have been the trial judge himself. Defense counsel was thus put to the choice of treating the Court as a party adverse to the defendant in these proceedings and criticizng the carrot-stick methods used to obtain Tate's testimony, or of inhibiting the defendant's final argument and causing him to refrain from making unfavorable comment on the Court's complicity in procuring what the defendant contends is perjured testimony. To be compelled to make this

Hobson's choice crippled the defendant's ability to defend himself and deprived him of his right to a fair trial and due process of law.

The language of this circuit in United States v. Bryan 393 F.2d 90,91 (2d Cir. 1968) relating to Judge Bryan sitting on the retrial of United States v. Simon after sitting on the original trial is applicable.

> We believe that at least in a multi-judge district such as the Southern District of New York where the necessity of retrial before the same judge is not present, the practice of retrial before a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality. Because we believe that this outweighs any considerations of judicial economy and convenience, we hold that it is the wisest practice, wherever possible, that a lengthy criminal case be retried before a different judge unless all parties request that the same judge retry the case.

For the same reasons, the defendant submits that where a judge has sentenced an accomplice heavily in part because of his failure to testify, where that same judge fails to act in a timely fashion on the accomplice's motion to reduce, and where the pendency of that motion becomes an integral part of the agreement between theGovernment and the accomplice, "it is salutary and in the public interest" to have a different judge sit on the second trial.

As Justice Frankfurter wrote in Public Utilities Comm. v. Pollack, 343 U.S. 451, 467 (1952), "The guiding consideration

is that the administration of justice should reasonably appear to be disinterested as well as to be so in fact." And as this circuit wrote in Wolfson, supra: "... if there be a real doubt created as to prejudice, this alone may be an important factor to be considered by the judge. Even Caeser's wife was not confronted with specific instances of specific acts." 396 F.2d at 125-126.

2. The Court Erred in Excluding the Testimony of George Maher and Captain Anthony Fabrizi.

On January 29, 1975, the defense called Mr. George Maher, a correctional officer for the State of Connecticut employed at the Bridgeport Correctional Center in Bridgeport, Connecticut. Mr. Maher testified that on February 19, 1975, the day after the robbery, the FBI came to the Bridgeport jail and showed him a photograph taken from the bank surveillance camera. The photograph was of one of the bank robbers taken while the robbery was in progress.

The FBI asked Maher if he could identify the individual in the middle of the picture. (Tr.406) That individual was the man later claimed by the Government to be the defendant, William Robinson.

Maher told the FBI "that he looked vaguely familiar." (Tr.402) The picture was left with Maher to be picked up the next day. Maher took the picture to his office and passed it around to other officers. According to Maher, "They felt that they in turn knew him too, but they just couldn't put a name onto it, and they felt that he had been there [the Bridgeport jail] recently."

Maher testified further that the officers went "two months back into the files, because they felt this was the time period he was there, and they pulled maybe eight or nine pictures and they were left on my desk, and then we went over 'em again." (Tr.402-403)

Q. Is this with your staff that you went over them again?

A. Right

Q. Did you come to any conclusions?

A. Yes, we did.

Q. Did you come to a conclusion as to the person that you thought was in that photograph?

A. That resembled him.

Q. What was that conclusion?

At this point, the Government objected. The precise grounds of the Government's objection were not stated. In response to certain remarks from the court, defense counsel stated: "Your Honor, I would use as the basis for the admissibility of this testimony Rule 704 in the Federal Rules of Evidence. That I think relates specifically -- and particularly with reference to the legislative history -- to the opinion of lay witnesses even as to the ultimate issue." (Tr.404)

The Court sustained the Government's objection. (For this entire exchange, see the transcript at App.)

The following day, defense counsel indicated that had Maher been permitted to testify he would have stated that he and the staff of the correctional center identified the individual in the photograph supplied by the FBI as a man by the name of Eli Turner whom they had known as an inmate in the Bridgeport jail. (Tr. 516)

Furthermore, had the Court's ruling been favorable to

defense, the Government had agreed to a stipulation which was read into the record for appeal purposes:

> If Captain Anthony Fabrizi of the Bridgeport Police Department were called, he would testify that on February 12, 1975, and on February 13, 1974, local armed robberies occurred; that Eli Turner was suspected by the Bridgeport Police of being responsible for these two armed robberies; that on February 18, 1975, the date of the bank robbery in Shelton, the Bridgeport Police were in the process of obtaining arrest warrants for Eli Turner ; that on February 18, the Bridgeport Police were looking for and had not yet apprehended Mr. Turner; and that Eli Turner is six feet one inch in height, 190 pounds in weight, and 35 years in age. (Tr. 517-518)

After extensive exchange between the Court and defense counsel, the Court sustained its earlier ruling to exclude the testimony. (This entire exchange appears in the Appendix at App.)

The appellant respectfully submits that Rules 701 and 704 of the Federal Rules of Evidence specifically permit the kind of testimony that the defense sought to elicit from George Maher. The rule sets forth three requirements, all of which were satisfied by Mr. Maher's proposed testimony: (a) Mr. Maher was not testifying as an expert; (b) His opinion that the individual in the photograph was Eli Turner was based on Maher's personal observation of Turner while Turner was in the Bridgeport Correctional Center and Maher's personal examination of the surveillance photograph; and (c) Maher's testimony was clearly helpful to the determination of a fact in issue -- specifically, the identity of the man in

the photograph claimed by the Government to be the defendant, William Robinson.

The fact that the issue in question -- the identity of the man in the photograph -- was the "ultimate issue" in the case calls for reference to Rule 704 of the Federal Rules of Evidence. That Rule specifically prohibits excluding an opinion merely "because it embraces an ultimate issue to be decided by the trier of fact." With respect to Rule 704, the Advisory Committee Note states further,

> ... the socalled "ultimate issue' rule is specifically abolished by the instant rule.
>
> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact.

Passage of Rules 701 and 704 underscores the ultimate wisdom of Judge Learned Hand's comment fifty years ago that "... the exclusion of opinion evidence has been carried beyond reason in this country, and ... it would be a large advance if courts were to admit it with freedom" Central Railroad Co. v. Monahan, 11 F.2d 212, 213-214 (2d Cir. 1926)

The combined testimony of Maher and Fabrizi was of great importance to the defense for a number of reasons.

First, the primary issue in this case was identity.

Second, the chief evidence for the defense in each trial was the film strip from the photosurveillance cameras and the photographs taken and blown up from that film strip. The defense

defense contended that the person in those photographs was someone other than the defendant and that the jury could see that for themselves.

Thirdly, Maher and Fabrizi were state employees whose testimony was therefore disinterested.

Finally, the individual identified by Maher as Eli Turner had the same physical characteristics as did the "man across the counter" described by the two tellers. The fact that Eli Turner was, at that time, wanted for two other armed robberies is even more compelling evidence that the man in the photograph might well have been Turner rather than Robinson.

In conclusion, it should be noted that this evidence was admitted during the first trial.

3. The Court Erred in Excluding the Testimony of Kenneth Wilson.

Soon after the Court excluded the testimony of George Maher, the defense called Kenneth S. Wilson. Mr. Wilson had testified in the first trial that he had known William Robinson for nine years and that, in his opinion, the individual in the photo-surveillance photograph was not the defendant. "To me," said Wilson, "it doesn't look like him. It could be almost anybody. His features you know look different."

The Government objected to Wilson's testimony in the second trial, and the Court sustained the objection, asking "How do you distinguish the claim with respect to Mr. Wilson from that of Mr. Maher with respect to looking at a photograph and giving an opinion as to whether or not the defendant is the person portrayed in that photograph?"

The defendant respectfully submits that the two claims are, in fact, indistinguishable: just as Rules 704 and 701 make George Maher's testimony admissible, they also govern the admissibility of Kenneth Wilson's testimony.

For all of the reasons stated previously with respect to Maher's testimony, the appellant respectfully submits that the court erred in excluding the Wilson testimony.

(See Appendix at App.)

4. The Court Erred in (a) Admitting the Rebuttal Testimony and Evidence of Walter F. Glennon, (b) Excluding the Surrebuttal Testimony of Robert E. Porter, and (c) Denying the Defendant's Request for a Continuance.

To rebut the alibi testimony of Joseph Burroughs, the Government called Walter F. Glennon, the Manager of the Unemployment Compensation Office in New Haven, Connecticut. Over the objections of defense counsel, Glennon testified from certain documents which had been gathered by other employees of the State Labor Department showing (1) that the last unemployment check Burroughs had picked up had been on February 5, not February 18 as he had testified, and (2) that Burroughs had not picked up an unemployment check on February 18, 1975 at all.

Rules 803(6) and 803(7) provide for the admissibility of testimony which would otherwise be excluded under the hearsay rule if that testimony is based on records kept in the regular course of a "business" activity. Those rules also provide that the testimony may come in only through the "custodian or other qualified witness." The rules state further that such evidence will not be admittied if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

The appellant submits that Glennon was neither a custodian nor a qualified witness within the meaning of these

two exceptions to the hearsay rule. His testimony should therefore have been excluded.

The records in question came from two sources: the Unemployment Compensation Office in Bridgeport -- where Burroughs allegedly went to get his check on February 18 -- and the central office of the State Labor Department in Wethersfield -- where the central files are apparently kept.

There can be no dispute that Mr. Glennon as manager of the New Haven office was not the "custodian" of these records.

More significantly, however, Glennon was not a "qualified witness" because he was unable to testify as to the reliability the accuracy or the completeness of the records. As Manager of the Unemployment Compensation Office in New Haven, Glennon cannot testify as to the reliability of the procedures and the accuracy of the records in the Unemployment Compensation Office in Bridgeport. And, not having been the individual who conducted the search for the documents in Wethersfield, he was unabl to testify as to the condition of the files or whether the search was a complete one. */

As the Supreme Court noted in Palmer v. Hoffman, 318 U.S. 109 (1943), when it comes to the business records exception to the hearsay rule, there is "need for proof that

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*/ In fact, it appeared that the Labor Department had complied with the Government's subpoena only partially. No vouchers or cancelled checks were produced -- documents which existed according to Glennon. More importantly, the February 5 entry in the records came at the bottom of the page, and Glennon could not testify that the next page which might be missing might have additional entries.

the particular records have a high degree of trustworthiness."

The burden of establishing that trustworthiness falls on the party offering the evidence.

> ... it is a pre-requisite that a firm foundation of admissibility must be laid by convincing the trial court that the circumstances of the making of the record are such that accuracy is not merely probable,but highly probable. United States v. DeGeorgia, 420 F. 2d 889, 894-895 (9th Cir. 1969)

The appellant submits that Glennon's opinion as to the accuracy and reliability of these records was insufficient to establish the requisite degree of trustworthiness for the exception to the hearsay rule to operate fairly. This is particularly true in light of the defendant's evidence that the central records were "confused." (App. 154) (For the transcript of Glennon's entire testimony, see App. 155-193)

The court futher erred in excluding the surrebuttal testimony of Robert E. Porter, the investigator for the Office of theFederal Public Defender. In response to the Government's information that the Government "intends to rely upon John Pescatelli, Assistant Director, Employment Security Division, Wethersfield, Connecticut to rebut the testimony of the defendant's alibi witness," (App. 153) Porter contacted Pescatelli who referred Porter to Mr. William Kegler, the individual who "was going the research into Burroughs' file."

Porter spoke with Kegler on January 21 while Kegler was in the process of researching Burroughs' file. Kegler

told Porter that "Although there are no records of payments this doesn't mean that no payments were made." This statement is particularly important since Burroughs may well have been paid on February 18 but, according to Kegler, that does not mean a record of that payment was kept. Moreover, Kegler stated that the records in their central files were "confused" and there did not seem to be "anything definite."

Judge Zampano reviewed Porter's investigative memorandum and concluded "I am not sure that that even rebuts the testimony today... A good portion of this memorandum has to deal with central files and are conclusory in nature and do not even address themselves to any particular person -- Joseph Burroughs." The judge sustained the Government's objection.

The appellant contends that Porter's testimony should have been admitted under Rule 803(1) of the Federal Rules of Evidence, the "Present sense impression" exception to the hearsay rule.

In light of the defendant's claims as to the unreliability of these records and in light of Glennon's inability to testify from first-hand knowledge as the trustworthiness of these documents, Judge Zampano should have granted a brief continuance to allow counsel to procure that testimony. The defendant's request for an opportunity to present surrebuttal evidence came just before the luncheon recess on a Friday. The Court had already concluded that the jury would neither be charged nor sent to deliberate until after the week-end.

If the Court had granted the continuance, the only result would have been to defer counsels' final arguments from Friday afternoon to Monday morning.

The alibi testimony of Joseph Burroughs was extremely important to the defense case. To allow the Government's rebuttal to that testimony to go unchallenged, particularly in light of the defendant's offer of proof contained in Porter's investigative memorandum, resulted in a severe injustice to the defendant. The interests of justice required a brief interruption in the trial. If the Porter surrebuttal testimony was not to be admitted, the Court should have granted a brief continuance.

5. The Court Erred in Failing to Include Certain Cautionary Language about Eyewitness Identification in the Jury Charge.

The defendant requested that certain cautionary instructions be given to the jury with respect to eyewitness identification. (App.208-211) When the judge failed to include specific language relating to possible suggestiveness of photographic identification procedures, the defendant took exception and requested that the language be given in a supplemental instruction. That request was denied. (App. 764-766)

The two sentences specifically requested by the defendant were:

(1) Even if the police followed the most correct photographic identification procedures and showed him the picture of a number of individuals without indicating whom they suspected, there is some danger that the witness may make an incorrect identification."

(2) Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of a subsequent lineup or courtroom identification."

The language for these requested instructions was taken from Simmons v. United States, 390 U.S. 377-384 (1968), United States v. Fernandez, __ F.2d __ (2d Cir. 1972) and United States ex rel Phipps v. Follette, 482 F.2d 912 (2d Cir. 1970)

These two sentences were included in Judge Newman's charge to the jury in the first trial. (App. 226-227)

The appellant respectfully submits that the facts of this case relating to the photographic identifications by the two tellers -- followed by the one-on-one show up outside of Judge Newman's courtroom -- required that these instructions be given to the jury. Although the appellant recognizes that the procedures employed by the FBI in obtaining the photographic identifications were insufficiently suggestive to warrant their suppression as a matter of law, there can be little dispute that there were elements of suggestiveness present.

With respect to the courtroom identification of the defendant by the two tellers, the defendant's entire case rested on the argument that those identifications were the product of an original photographic mis-identification followed by "imprinting" and "bolstering." The court should have given instructions that specifically recognized the validity of this argument, and the appellant respectfully submits that the court erred in failing to give those instructions.

6. Conclusion

For all of the reasons set forth above, the appellant respectfully requests that the judgment of conviction be vacated and that this case be remanded for a new trial to be conducted by a judge other than Judge Zampano. It is further requested that, at the new trial, the testimony of George Maher, Anthony Fabrizi and Kenneth S. Wilson be admitted and that the testimony of Walter Glennon be excluded.